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No. 279

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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with them on the brief.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners pray that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered July 21, 1947, affirming a judgment of conviction and sentence of the District Court for the Southern District of New York, entered July 10, 1946, on the verdict of a jury (R. 1915).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A., Sec. 347(a)].

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, appears at the end of the record (R. 2193-2201).

Statutes Involved

Section 248, Revised Statutes (Sec. 242, Title 5, U. S. C.), provides, among other things, that the Secretary of the Treasury "shall superintend the collection of the revenue".

Section 3901, subdiv. (a)(1), Internal Revenue Code (Title 26, U. S. C.), provides that the Commissioner of Internal Revenue, under the direction of the Secretary, "shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue".

Section 376, Revised Statutes as amended (Sec. 326, Title 5, U. S. C.), provides:

> "The General Counsel for the Department of the Treasury, under the direction of the Secretary of the Treasury, shall take cognizance of all frauds or attempted frauds upon the revenue, and shall exercise a general supervision over the measures for their prevention and detection, and for the prosecution of persons charged with the commission thereof."

Section 3761, Internal Revenue Code (Title 26, U. S. C.), provides:

> "(a) *Authorization.* The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution

or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

"(b) *Record.* Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

"(1) The amount of tax assessed,

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

"(3) The amount actually paid in accordance with the terms of the compromise."

Section 5 of Executive Order No. 6166 of June 10, 1933 (printed after Sec. 132, Title 5, U. S. C. A., and authorized by Chap. 212, Sec. 403 of the Act of March 3, 1933, 47 Stat. 1518) provides:

"The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Questions Presented

1. Does the United States Treasury Department have the power to grant immunity from criminal prosecution to delinquent taxpayers who make a voluntary disclosure before investigation without actually making a compromise agreement, such power having been exercised without challenge since long before 1934 for the purpose of enabling the Treasury Department to collect unpaid taxes from such taxpayers?

2. Even if the promise of immunity was *ultra vires,* was it a denial of due process and a violation of the Petitioners' constitutional immunity from self-incrimination to use to convict them evidence obtained as a part of a confession knowingly induced by the Treasury Department's promise of immunity?

3. Was the question whether the Petitioners had made a voluntary disclosure before investigation improperly withdrawn from the jury on the ground that the Treasury Department was not bound by its promise of immunity?

4. Should the jury have been permitted to consider whether the Petitioners' confession was voluntary in order to determine what consideration should be given to evidence disclosed in, and obtained as part of, a confession induced by an official promise of immunity?

5. Did the decision by the Circuit Court of Appeals of a disputed question of fact on post-trial "findings and the evidence which the Trial Judge credited" (R. 2197) cure the error in withdrawing from the jury the question

whether the Petitioners made a voluntary disclosure before investigation?

6. Did the Circuit Court of Appeals properly decide that there had been no denial of due process and no violation of the Petitioners' immunity from self-incrimination for the stated reason that the Petitioners' confession was not induced by the Treasury Department promise of immunity because an investigation was begun before the confession was made?

7. Was there such a departure from the usual course of judicial procedure in the instant case as to call for the exercise by this Court of its power of supervision?

Statement

1. The Proceedings.

The indictment charged in twenty-three counts that the Petitioners, who were respectively the President and sole owner, the Manager and the Chief Accountant of seven corporations, had participated in attempts to evade payment of income taxes by filing false returns for each of said corporations for the tax years 1940 to 1944, inclusive, with intent to defraud the revenue, and that they had conspired to do so (R. 11-57).

Pre-trial orders were made by the District Court striking out pleas in abatement and denying a motion to dismiss the indictment for the reason, among others, that the claim of immunity was matter of defense for the trial (R. 86, 87, 92, 93).

A pre-trial order was also made denying a motion for the suppression and return of evidence, with leave to renew at the trial (R. 158, 159, 160). It was renewed at the opening; and an understanding was reached between Court and counsel that the Government's evidence, subject to the motion, should be received subject to a continuing objection and a motion to strike under the Fourth and

Fifth Amendments, and if the motion should be denied, that the question involved should be submitted to the jury under the general issue if the law permitted (R. 233-234).

There was no denial of the tax frauds charged (R. 1758). The sole issues litigated were whether the Petitioners had made a voluntary disclosure before investigation in reliance on the immunity promised by the Treasury Department in its promulgation of its disclosure policy, and whether, if the Treasury promise was *ultra vires*, the use of the evidence disclosed by their confession to convict them was a denial of due process and a violation of their immunity from self-incrimination.

But the Court withdrew those issues from the jury. It charged that, even though there was a voluntary disclosure before investigation in reliance on the Treasury policy, the Treasury Department was not bound by its promise for the reason that it had no power to make it and could not grant immunity except by a formal compromise agreement (R. 1864-1869).

The Court refused to charge that evidence obtained in a confession induced by the promise not to recommend a criminal prosecution, and the assurance of immunity by the Collector of Internal Revenue to whom disclosure was made, could not be considered by the jury, to which refusal exception was taken (R. 1831, 1884). After the evidence was closed, it said that it would submit that question to the jury (R. 1690), but later decided not to do so, its decision being prompted, so it said, "very largely by the fact that it may work harm to the defendants" if mentioned (R. 1841, f. 5523).

Exception was also taken to the charge on the subject of voluntary disclosure (R. 1883, 1887).

Although the sole issue submitted to the jury, whether the Petitioners had participated in the filing of false tax returns with intent to defraud the revenue, was not contested, the jury in reporting the verdict of guilty, thus virtually directed by the Court, recommended clemency (R. 1897).

After the verdict the Trial Court found the facts on the contested issues in favor of the Government, though it had refused to submit them to the jury, and on those findings entered an order denying the motion for the suppression and return of evidence (R. 2170-2181), which motion had as a practical matter become wholly *functus* by the denial of the motion to strike. An appeal was taken from that order and consolidated with the appeal from the judgment (R. 2182-2187).

2. The Treasury Policy.

The Trial Court found as follows:

> "At all times between 1934 and the date of the trial of this cause the Treasury Department of the United States had a settled policy to the effect that any taxpayer, even one guilty of fraud, who voluntarily disclosed wrongdoing to the Treasury Department prior to investigation would not be prosecuted. This policy was publicized by various important Treasury officials during the period mentioned" (R. 2171).

That policy long antedated 1934 (R. 1059).

Mr. John P. Wenchel, long Chief Counsel for the Internal Revenue Bureau, a Government witness, testified that there can be no prosecution of a tax fraud case without a Treasury Department recommendation (R. 1562-1563), that the voluntary disclosure policy is to encourage disclosure prior to investigation (R. 1561), that in such cases there is no need and it is not the practice to enter into compromise agreements, but that on the mere making of a voluntary disclosure, prior to any subsequent action by the Treasury Department, the taxpayer secures immunity from prosecution "the minute he comes in" and "there may never be a compromise record written up if the full tax is paid" (R. 1559, 1560).

Speaking to the public for the Treasury Department, Secretary Vinson said that under the Treasury Department policy even the willful evader secures immunity from

a criminal prosecution by a voluntary disclosure before an investigation "is under way" and that there is nothing complicated in going to the Collector of Internal Revenue and simply saying, "There is something wrong with my return and I want to straighten it out" (Ex. II, R. 2127, printed at R. 139, offered at R. 898).

Mr. Jackson, then Assistant General Counsel of the Treasury Department, said in 1934, in substance and effect, that it had theretofore been the practice of the Treasury Department under its disclosure policy to excuse from criminal prosecution taxpayers troubled by conscience or the activities of Revenue Agents who made voluntary disclosure and that "Confessions are still heard but penance is more fitting the offense" since thenceforth the Treasury Department would insist upon payment of the full civil penalties, though continuing to forego criminal prosecution (Ex. MM, R. 2129, offered at R. 1043).

Attorney General Olney had ruled as far back as 1893 that the Treasury Department had exclusive jurisdiction of tax fraud cases at all stages even including the giving of directions to United States District Attorneys for their prosecution (20 Op. Atty. Gen. 715).

Prior to the Executive Order of June 10, 1933, the power to grant immunity to delinquent taxpayers for making a voluntary disclosure before investigation was exercised by the Treasury Department under its authority over the collection of the revenues and its exclusive jurisdiction to prosecute tax fraud cases, obviously conferred upon it as an aid to the collection of the revenues.

It will be seen that by the Executive Order (p. 3, *ante*) the function of prosecuting and of supervising the work of United States Attorneys in tax fraud cases was transferred from the Treasury Department to the Department of Justice, and thus for the first time the latter Department acquired jurisdiction to prosecute such cases.

By the second paragraph of the Order "the function of decision whether * * * to prosecute * * * *" such cases was also transferred to the Department of Justice from

the Treasury Department, *but only after a reference of the case by the Treasury Department;* and that function of decision whether to prosecute was reserved to the Treasury Department prior to such reference by the third and fourth paragraphs of the Order.

Since 1933 the Treasury Department has exercised its power to grant immunity under its retained function of decision, prior to reference of a case, whether to prosecute, and its sole power to refer it for prosecution. The Department of Justice has no jurisdiction to prosecute tax fraud cases until the Treasury Department has, in performance of this function, made its own decision to prosecute and has referred the case for prosecution.

The subsequent revisions of said Section 376 of the Revised Statutes and Section 3761 of the Internal Revenue Code confirm that construction, since they in no way limited the power thus publicly exercised.

Indeed, the power to grant immunity from a criminal prosecution is incidental to and a part of the greater power to compromise "any civil or criminal case arising under the internal revenue laws", conferred on the Treasury Department prior to a reference and on the Department of Justice thereafter by said Section 3761 as amended by the Act of 1938 (Sec. 3761, Title 26, U. S. C.; Rev. Stat., Sec. 3229; Revenue Act of 1938, Sec. 815).

Since 1863 the Treasury Department has had general supervision over the measures for the prevention, detection and prosecution of tax frauds (Act of March 3, 1863, C. 76, Sec. 2, 12 Stat. 739; Rev. Stat., Sec. 376).

Since 1868 it has had the power to compromise either civil or criminal liability, or both (Act of July 20, 1868, C. 186, Sec. 102, 15 Stat. 125, 166; see Act of July 13, 1866, C. 184, 14 Stat. 98, 145, 146).

Since June 10, 1933, it has had the power of decision prior to a reference whether to prosecute a tax fraud case, which it had exercised at all stages before 1933.

It has the sole power to refer a case to the Department of Justice for prosecution.

3. The Disclosure.

The Petitioner Henry Lustig instructed the Petitioner E. Allan Lustig to redeposit in the banks something over $1,800,000 in currency that had been accumulated in a bank vault, and to make disclosure to the Collector of Internal Revenue for the District, saying that he had been advised that there would be no criminal aspects of the matter if there was a disclosure before investigation (R. 1084, 1179, 1221).

The bank deposits were made as directed in different banks between February 27 and March 28, 1945 (R. 1089, 1091, Exs. B-I, R. 2102-2108, offered at R. 555-562), and on March 26th disclosure was made to Collector Pedrick by the Petitioner E. Allan Lustig; and the Collector assured him that that removed the criminal aspects of the case and made it a civil case (R. 1109-1110). That is disputed, but is corroborated by credible witnesses and documentary evidence (R. 1284, 1298; Defts.' Ex. SS, R. 2140, offered at R. 1106).

Post-trial Finding 23 says that the Petitioners knew that the redeposits would lead to the discovery of the tax frauds (R. 2178). But the Government contends that, having made the deposits in March with that knowledge, the Petitioners waited until April 25th to make any disclosure at all, at the risk of a Treasury Department investigation being started before disclosure; although the deposits were the first steps taken to carry out the decision to make disclosure.

As soon as the Petitioner Sobel had completed his computations of the understatements of income of the seven corporations for the five tax years in question, upon which the Collector was advised on March 26th he was engaged (R. 1110), and on April 25, 1945, formal disclosure letters for each of the seven corporations were prepared and presented to Collector Pedrick. Sobel's summaries of the tax deficiencies (Defts.' Ex. CC, R. 2125, offered at R. 736) were also submitted to him (C. C. A. Opinion, R. 2197).

The letters stated that there had been understatements of income, requested an examination of the books, and tendered cooperation and all the assistance necessary to enable the Treasury Department to determine the amount of tax deficiency (Exs. BB 1-7, R. 2123-2125, offered at R. 733, similar to Ex. D, R. 134).

Mr. Pedrick admits that he received the letters, and he referred them to the appropriate official to take charge of the examination requested. He does not claim that he raised any question as to their timeliness (R. 1428-1429). In due course they reached the Agent-in-Charge of examinations, Mr. Krigbaum, who on April 28, 1945, delivered them to Examiner Diehl to conduct the examination requested (R. 732-734, 934-941). Diehl began that examination at the offices of the taxpayers, which were made available to him, on May 14, 1945 (R. 702). Krigbaum was not called as a witness, but Diehl admits that on April 28th, when the letters were turned over to him, he first learned from the Petitioners' representative that the corporations' income had been understated by means of overstatements of purchases and understatements of sales (R. 755-756, 788), that when he began the examination on May 14th he was furnished Sobel's summaries of the understatements of income (Ex. CC, R. 741), that as he reached each corporation in turn Sobel gave him a statement or memorandum relating to that corporation (obviously Sobel's work-sheets (R. 794, Ex. KK, R. 2128, offered at R. 1026)), that as he desired any book, paper or record in the course of his examination it was promptly produced and fully explained (R. 791-793), that every explanation requested was given and found in each instance to be correct (R. 794), that the Petitioners instructed their employees to give him and his assistants whatever information they requested (R. 801-803) and that his computations of the understatements of income (Govt.'s Ex. 306, R. 2026, offered at R. 703) substantially agreed with Sobel's (Defts.' Ex. CC), and that with minor, insignificant exceptions the different items were identical (R. 743-758).

There is no denial that Diehl's examination was solely under and pursuant to the disclosure letters of April 25th. There is no claim that any demand was ever made for the production of the books or that any statutory authority of the Treasury Department was ever invoked to procure them.

The indictment charges corporate tax frauds only. There is no claim that any investigating officer or examiner was ever given or ever asked the Collector of Internal Revenue for the corporate tax returns in connection with or for the purpose of any tax fraud investigation.

4. The Alleged Investigation by the Treasury Department.

There is no pretense that any Treasury Department official, agent or examiner ever made or attempted to make any examination or investigation of the corporate tax frauds charged in the indictment, except the examination made by Diehl under and pursuant to the request of the disclosure letters of April 25, 1945, nor any suggestion that any demand was ever made by Treasury Agents for the production of the corporate books, or that any of the statutory powers of examination of the Treasury Department were ever invoked, or that there was ever any occasion to invoke such powers.

The Petitioners knew, as found by the District Court as above, when the bank deposits were made that they would be reported to the Treasury Department. They were so reported by the Federal Reserve Bank of New York and on March 24, 1945, a copy of that report was sent by the Chief of the Intelligence Unit to Agent McQuillan in New York with a transmittal memorandum (Ex. 333, R. 2076, offered at R. 1344). The memorandum (Govt.'s Ex. 333) did not suggest, much less direct, a tax fraud investigation. At most, it suggested an inquiry into the fact of the reported deposits which the Petitioners knew would be reported when they were made, as above. However, the Circuit Court of Appeals found from post-trial

"findings and evidence which the Trial Judge credited that the investigation began at the latest on March 24, 1945" (R. 2197).

McQuillan and his sub-agents made inquiries at the Federal Reserve Bank and at some of the depositary banks and confirmed the fact of the deposits, as shown by McQuillan's reports to his Chief (Ex. 335, R. 2082, offered at R. 1349; Ex. 336, R. 2086, offered at R. 1349; Ex. 337, R. 2087, offered at R. 1354). That was the only investigation ever made by them, as shown by said exhibits. McQuillan did on March 27th address a letter of inquiry to Collector Pedrick asking for certain information relative to the filing of tax returns by Henry Lustig and three of the corporate taxpayers (Govt.'s Ex. 334, R. 2080, offered at R. 1347).

According to the testimony of E. Allan Lustig, as above, that was after he had made disclosure to Collector Pedrick, which the latter informed him was sufficient to remove the criminal aspects of the case and make it a civil case.

That letter of inquiry was not answered until June 1st (Defts.' Ex. JJJ, R. 2158, offered at R. 1375). In the meantime, the April 25th disclosure letters had been delivered to Collector Pedrick and pursuant to them Examiner Diehl had begun the requested examination of the corporate books and records at the offices of the taxpayers on May 14, 1945 (R. 707); and on May 24th Secretary Morgenthau had made the public announcement stated below (p. 14).

Commissioner Nunan, who referred the case to the Department of Justice for a criminal prosecution on August 15, 1945, never claimed that the investigation of the corporate tax frauds charged was begun by Exhibit 333, or that there was ever any such investigation except that conducted by Examiner Diehl, but put his decision on an entirely different ground, as stated later (p. 14). In fact, no other investigation was ever started or ever got "under way", to use the words of Secretary Vinson quoted at page 8, *ante*. Certainly, the contrary could not be decided as matter of law.

5. The Reference of the Case to the Department of Justice for a Criminal Prosecution.

On May 24th, ten days after Diehl's examination of the books began, Secretary Morgenthau stated in a press conference that Treasury Agents had discovered serious tax evasions by a restaurant chain, that a lawyer had made a so-called disclosure, but that the Treasury Department was going to prosecute the case "to the hilt". "We are going to do something in this case we never did before" (R. 956-959).

Mr. Oestreicher, the Petitioners' tax representative, testified that the next morning the Treasury Agents conducting the examination at the offices of the taxpayers admitted that they had discovered nothing not disclosed to them and evinced surprise at the Secretary's statement (R. 956-957); and none of them, though in court, took the stand to deny that testimony.

Two weeks later, Mr. Nunan, the Commissioner of Internal Revenue, wrote Mr. Oestreicher that he had no doubt that the disclosure was not voluntary and that the Secretary agreed with him (Ex. 327, R. 2046, offered at R. 1243).

On August 15th he referred the case to the Department of Justice for criminal prosecution and explained his action by saying that the disclosure was not voluntary because of a "tip-off" eight or nine days before April 25th (R. 1247). He did not take the stand to explain the grounds of his action and there is no pretense that he ever claimed that any investigation of the corporate tax frauds was under way when disclosure was made.

The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals decided:

1. "The compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise. * * * There was no issue of fact for

court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity" (R. 2199-2200), and

2. The constitutional question of due process and immunity from self-incrimination was "one of the admissibility of evidence" (R. 2198), and the observation of this Court in *Wilson* v. *U. S.* (162 U. S. 613, 624) was *dictum* and "at most indicates that the question of admissibility may be left to the jury, not that it must" (R. 2199).

The Circuit Court of Appeals enumerated a number of facts found by the Trial Court and said: "It appears from what we have already said that there was no disclosure of tax deficiencies until April 25, 1945, * * *. We think it clear from the findings and the evidence which the Trial Judge credited that the investigation began at the latest on March 24, 1945" (R. 2197-2198).

It also said: "The correctness of the findings of fact objected to depended, so far as not already discussed, upon conflicting testimony or inferences therefrom" (R. 2200-2201).

Assignments of Error

1. The District Court erred in withdrawing the immunity issue from the jury on the ground that the Treasury Department was not bound by its promise (f. 5594; Exception, f. 5647).

2. The District Court erred in refusing to charge the Petitioners' request No. 25 (ff. 5491-5493; Exception, f. 5656).

3. Having withdrawn the only contested issues from the jury on rulings of law, the District Court erred in attempting after the trial to resolve disputes of fact which were for the jury (R. 2170-2179).

4. Both the Courts below erred in holding that a delinquent taxpayer could secure immunity from a criminal prosecution only by actually entering into a compromise agreement with the Treasury Department (R. 1868, 2199-2200).

5. The Circuit Court of Appeals erred in summarily deciding the question of due process and self-incrimination as a question "of the admissibility of evidence" (R. 2198).

6. The Circuit Court of Appeals erred in summarily disposing of the questions of immunity, due process and self-incrimination as illusory.

7. The Circuit Court of Appeals erred in finding that the investigation of the corporate tax frauds charged in the indictment was begun on March 24, 1945. It was for the jury to say when the investigation was begun, if ever.

8. The Circuit Court of Appeals erred in finding, also on sharply conflicting evidence, that no disclosure was made prior to April 25, 1945. That was a question for the jury.

Reasons for Granting the Writ

1. The instant case involves a federal question of the utmost public importance, which has not been, but should be, decided by this Court, namely, whether the United States Treasury Department has the power, which it has exercised since long prior to 1933, to grant immunity from criminal prosecution to delinquent taxpayers for making a voluntary disclosure before investigation, in order to enable the Treasury Department to collect unpaid taxes, without actually making a compromise agreement with the taxpayer.

2. The decision of the Circuit Court of Appeals of the important constitutional questions of due process and immunity from self-incrimination under the Fifth Amendment is in conflict with the applicable decisions of this Court.

See:

Boyd v. *U. S.*, 116 U. S. 616, 633.
Bram v. *U. S.*, 168 U. S. 532.
Gouled v. *U. S.*, 255 U. S. 298.
Wan v. *U. S.*, 266 U. S. 1, 15.
Olmstead v. *U. S.*, 277 U. S. 438, 458, and see dissenting opinion 469-488.
McNabb v. *U. S.*, 318 U. S. 332, 339.
Ashcraft v. *Tennessee*, 322 U. S. 143.
Lyons v. *Oklahoma*, 322 U. S. 596, 602.
Malinski v. *New York*, 324 U. S. 401.

3. In deciding that the question of due process and self-incrimination was merely a question of the admissibility of evidence for the Court to decide, the Circuit Court of Appeals decided an important federal question contrary to the applicable decisions of this Court, and its decision is in conflict with the decisions of other Circuit Courts of Appeals.

Wilson v. *U. S.*, 162 U. S. 613, 624.
Kent v. *Porto Rico*, 207 U. S. 113, 119.
Wan v. *U. S.*, 266 U. S. 1, 16.
U. S. v. *Murdock*, 284 U. S. 141, 150, 151.
Lisenba v. *California*, 314 U. S. 219, 238.
Lyons v. *Oklahoma*, 322 U. S. 596, 602.
Cohen v. *U. S.* (C. C. A. 7), 291 Fed. 368, 369.
Denny v. *U. S.* (C. C. A. 4), 151 F. 2d 828, 833-834.
McAffee v. *U. S.* (App. D. C.), 105 F. 2d 21, 25-27.

4. The Circuit Court of Appeals sanctioned such a departure by the District Court from the usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

McNabb v. *U. S.*, 318 U. S. 332, 339.

WHEREFORE, it is respectfully submitted that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be issued as prayed for.

Respectfully submitted,

HENRY LUSTIG,
E. ALLAN LUSTIG and
JOSEPH SOBEL,
Petitioners,

by
NATHAN L. MILLER,
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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petitioners maintain:

1. The Treasury Department had the power to make and perform its promise that delinquent taxpayers would secure immunity from criminal prosecution by making a voluntary disclosure before a Treasury investigation was "under way", which power has been exercised without challenge for more than twenty years and continues to be exercised to the present time.

2. It was for the jury to decide the admitted dispute of fact whether a voluntary disclosure was made before any Treasury Department investigation was under way, and the Courts below usurped the function of the jury in deciding that question post-trial.

3. If the Treasury Department promise was *ultra vires*, it was a denial of due process and a violation of the Petitioners' immunity from self-incrimination to use to convict them the evidence disclosed in reliance upon the promise of immunity, even though an investigation was under way when disclosure was made.

4. The jury was not permitted to decide, and the District Court did not undertake to decide, whether the Petitioners were induced by the Treasury Department promise to make their confession and disclosure, and whilst the Circuit Court of Appeals held that that was merely a question of the admissibility of evidence for the Court finally to decide, it found that the Petitioners were not induced by the Treasury Department promise to make disclosure, and based its finding on the erroneous ground that a Treasury Department investigation had already begun, without considering the determinative facts.

5. As a result of the unusual and improper course of procedure followed and sanctioned by the Circuit Court of Appeals, the Petitioners have been denied their conceded right to a jury trial of the issue of immunity, if the Treasury Department had the power to make and perform its promise of immunity, and the question whether their constitutional rights were invaded has never been decided on the determinative facts either by the Court or jury.

POINT I

The United States Treasury Department should welcome an authoritative decision of the question whether it has the power, without actually entering into formal compromise agreements, to grant immunity from criminal prosecution to delinquent taxpayers who make voluntary disclosures before investigation—a power which it has exercised without challenge since long before 1933.

The question is squarely presented in the instant case—

(1) By the decision of the Circuit Court of Appeals that "the compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise", and that there having been no actual compromise agreement "there is no merit in the defense of immunity"; and

(2) By the decision by the Court of disputed questions of fact which were plainly for the jury if the Trial Court and the Circuit Court of Appeals were in error on the question of law.

It is obvious that the decision of the Circuit Court of Appeals completely nullifies the disclosure policy of the Treasury Department since it cancels all assurances and leaves unreviewable the untrammelled decision of the Treasury Department to prosecute despite its promises. The making of a compromise agreement would have to depend on the result of a post-disclosure investigation, and such an uncertain "immunity" is not what was promised by the promulgated policy.

The Circuit Court of Appeals decided the question apparently without considering either the statutes quoted in the petition (p. 2) and the fact of their frequent revi-

sions during the period of the exercise of the power without in any way limiting it, or the Executive Order of June 10, 1933 (Petition, p. 3), which transferred the function of prosecution theretofore exercised by the Treasury Department in tax fraud cases to the Department of Justice, but expressly reserved in the Treasury Department the function of decision whether to prosecute, up to the very time of the reference of a case to the Department of Justice for prosecution.

It erroneously supposed that the question had been decided by this Court in *Botany Mills* v. *United States*, 278 U. S. 282, although that was a civil case involving the validity of an agreement of compromise of civil liability, lacking the concurrences required by the statute in such case, and the question of immunity from criminal prosecution under the Treasury Department disclosure policy was neither involved or considered.

For the convenience of the Court we append to this brief a copy of that part of the address of Mr. Wenchel, then Chief Counsel of the Bureau of Internal Revenue, relating to the "disclosure policy" of the Treasury Department, delivered before the Tax Executives Institute on May 14, 1947, and reported in the Commerce Clearing House Standard Federal Tax Reports for 1947, Vol. 4, par. 8697, which shows that the Treasury Department has continued to exercise the power, now for the first time challenged, down to the very time when this cause was *sub judice* in the Circuit Court of Appeals.

POINT II

The decision of the Circuit Court of Appeals that it was for the Trial Court finally to decide whether the Petitioners' confession was induced by the Treasury Department's promise of immunity conflicts with the applicable decisions of this Court. It also conflicts with decisions of other Circuit Courts of Appeals.

Of course, the Petitioners did not contend, as the Circuit Court of Appeals appears to have thought, that it was for the jury to decide whether the evidence objected to was admissible.

This Court said in *Wilson* v. *United States,* 162 U. S. 613, 624:

> "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

That may have been *dictum* in the sense that it was not necessary to the decision, as the Circuit Court of Appeals thought, but it was a considered statement of the rule as applicable to the Federal courts; and in support of it this Court cited decisions of the State courts plainly indicating that this Court did not consider that the Federal rule differed from the rule followed by most of the State courts.

It said in *Kent* v. *Porto Rico,* 207 U. S. 113, 118-119, referring to the submission of testimony "as to the voluntary nature of the confession" to the jury, "that this action of the court was proper, if there was conflict of testimony, is not open to controversy", citing *Wilson* v. *United States, supra.*

It held in *Wan* v. *United States,* 266 U. S. 1, 14-16, that "a confession obtained by compulsion must be excluded,

whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise", citing *Bram* v. *United States,* 168 U. S. 532 (and, in a footnote, *Wilson* v. *U. S.* and *Kent* v. *Porto Rico*), and that the confession obtained in that case should have been excluded because "the undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass." In the footnote there was cited, among others, *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383, 398; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392.

In *United States* v. *Murdock,* 284 U. S. 141, 150, it decided that the questions raised by a special plea of immunity under the Fifth Amendment "were mere matters of defense determinable under the general issue".

In *Lisenba* v. *California,* 314 U. S. 219, 236-238, this Court said that it had formulated the rules to govern in trials in the Federal courts involving questions of due process, citing in a footnote *Sparf and Hansen* v. *United States,* 156 U. S. 51, 55; *Wilson* v. *United States,* 162 U. S. 613, 622; *Bram* v. *United States,* 168 U. S. 532, and *Wan* v. *United States,* 266 U. S. 1, 14, and that "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false".

In *Lyons* v. *Oklahoma,* 322 U. S. 596, 602, this Court said:

> "When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive

> actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision." [Citing the *Lisenba* case.]

Yet the Circuit Court of Appeals said that on the question whether there had been a denial of due process and a violation of the Petitioners' immunity from self-incrimination, the only function of the jury was to pass on the probative value of the evidence (R. 2198-2199); in short, that the requirements of due process would be satisfied if the accused were convicted on a coerced confession which was truthful, though if false it would have to be disregarded by the jury.

Professor Wigmore and some of the State courts have taken the view that the Fifth Amendment does not forbid the use of out of court confessions or of evidence which comes from a coerced confession, but this Court has decided the contrary so often that it would be superfluous to cite the decisions.

If all that was said by this Court in the above cited cases were *dicta* it would still remain that it has never decided the contrary.

Steele v. *United States,* 267 U. S. 505, cited by the Circuit Court of Appeals, was a search and seizure case involving the question whether there was probable cause for the issuance of the warrant which was not in doubt and in fact was res adjudicata. That case can have no applicability to the question here.

The decision below also appears to conflict directly with the determination of the same question by other Circuit Courts of Appeals (see *Cohen* v. *U. S.* (C. C. A. 7), 291 Fed. 368, 369; *Denny* v. *U. S.* (C. C. A. 4), 151 F. 2d 828, 833-834; *McAffee* v. *U. S.* (App. D. C.), 105 F. 2d 21, 25-27).

POINT III

The decision of the questions of due process and self-incrimination by the Circuit Court of Appeals conflicts with the applicable decisions of this Court cited in the petition (p. 17) and was based on wholly erroneous grounds without any consideration of the determinative facts.

It held on the post-trial findings and the evidence credited by the Trial Judge "that the corporate records were in no sense the result of any promise of immunity. They were furnished long after the government investigation had begun" (R. 2198).*

It thus disposed of the constitutional questions under the Fifth Amendment and the issue of immunity upon the mistaken theory that precisely the same facts controlled both, overlooking the fact conceded by the Government that questions of fact on the issue of immunity were for the jury, and overlooking the further fact that on the question whether there had been a denial of due process and a violation of the Petitioners' constitutional privilege against self-incrimination, it was immaterial whether the confession was after the investigation had begun if that confession was induced by the Treasury Department's promise of immunity under circumstances, as here, where the officials knew that the Petitioners were acting in reliance on that promise, and the Petitioners were led to believe they would receive the benefits thereof.

There was thus no occasion for it to consider, and it apparently did not consider, the undisputed fact established, as the Trial Judge said, beyond the "shadow of doubt" (R. 1862), that the Treasury Department did have

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* Incidentally, the notion of the Circuit Court of Appeals as to when the investigation is deemed to have been begun is quite different from the authoritative exposition by Mr. Wenchel, quoted in the appendix, *infra*, p. 35.

the widely publicized policy known as the "disclosure policy" and the further fact, established by uncontradicted evidence, and even by the testimony of the Government's own witness, Examiner Diehl, that the Petitioners had made a frank and complete disclosure even of the details of the understatements of income and of the method employed in the making of such understatements, together with the evidence thereof. Having ignored those two controlling facts, it naturally did not consider the connection between them.

The Circuit Court of Appeals stated that the information given the Treasury Department examiners and officials "could have been obtained by an examination of the books and records of the seven corporations and the records of the Federal Reserve Bank, even if the defendants had not submitted 'voluntary' statements" (R. 2195-2196), evidently thinking that to be material despite the undisputed fact that the information was not so obtained.

It said that Sobel's summaries of the tax deficiencies (Ex. CC) were submitted on April 25, 1945, to Collector Pedrick (R. 2197), thus disproving the post-trial finding to the effect that the April 25th disclosure was "belated and partial" (Finding 23, R. 2178). It disregarded the fact found by said post-trial finding that the Petitioners knew when the bank deposits were made that they would certainly lead to the discovery of the frauds. It thus wholly failed to consider the important and undisputed facts pertinent to the question whether the Petitioners' confession, unique for frankness and completeness, was induced by the Treasury Department's promise of immunity.

It apparently accepted the palpably erroneous view of the Trial Judge, the *ratio decidendi* of his decision as shown by said post-trial Finding 23, that the disclosure was solely induced by the bank deposits made from fear of some Government action respecting hoarded currency and by the knowledge that such deposits would lead to the discovery of the frauds.

Disclosures under the Treasury Department policy, as well as coerced confessions, are usually induced by hope or fear rather than a troubled conscience, and the important constitutional question of fact was whether the confession was induced by hope engendered by the Treasury Department's promise of immunity. The very fact of the fear of an investigation added to rather than detracted from the impelling force of the official promise of immunity.

The Kings Bench has ruled in *Rex* v. *Barker* (1941), 2 K. B. 381, that the books of the taxpayer produced as a part of the disclosure under a policy of the English Exchequer not unlike that of the United States Treasury Department were, because induced by the policy, not admissible against an accountant of the taxpayer who participated in the disclosure, even assuming that ordinarily evidence discovered as the result of an induced confession would be admissible in England though the confession itself would not be admissible. The books were held to be an integral part of the confession.

What, then, shall be said of our constitutional guarantees of due process and freedom from self-incrimination!

This Court has so zealously safeguarded the freedoms guaranteed by the Fifth Amendment, and especially the guarantee of due process, that even on a review of judgments of the State courts it makes an independent appraisal of the question whether there has been a violation of the due process clause of the Fourteenth Amendment.

Lisenba v. *California,* 314 U. S. 219.
Malinski v. *New York,* 324 U. S. 401.

And even apart from the constitutional questions, it exercises its plenary power of supervision to determine whether a Federal court has improperly admitted "incriminating statements from the defendants".

McNabb v. *United States,* 318 U. S. 332.

In the *Lisenba* case the Court said:

> "Where the claim is that the prisoner's statement has been procured by such means"—i.e., by a denial of due process—"we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both" (314 U. S. 219, 237-8).

In the *Malinski* case the Trial Court had held a preliminary hearing on the voluntary character of the confession and, having admitted the evidence, charged the jury "that a confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary" (324 U. S. 401, 404). Yet this Court reversed the judgment of conviction on the ground that there had been a denial of due process.

Independently of whether that question should have been submitted to the jury in the instant case, it has been decided, as far as it has been decided at all either by the District Court or the Circuit Court of Appeals, on erroneous grounds without any consideration of the controlling facts, and as though it were immaterial that the Petitioners were deliberately induced, that the Treasury Department officials knew they were confessing because of and in reliance upon the Treasury Department's avowed and publicized policy, and the confessions were deliberately received on that basis.

POINT IV

There was such a departure from the usual course of judicial procedure in the instant case as to call for the exercise of this Court's power of supervision.

That the procedure was most unusual cannot be doubted.

A pre-trial order denied a motion for the suppression of evidence with leave to renew at the trial. It was renewed

at the opening. Decision of the motion was reserved on the understanding that the evidence should be received subject to objection and a motion to strike and, if the motion should be denied, the question involved should be submitted to the jury under the general issue if the law permitted (R. 234).

The law not only permitted but required the submission of the immunity issue, unless the widely publicized disclosure policy of the Treasury Department was without warrant of law.

However, the Trial Court held that the law did not permit the submission of that issue to the jury because said policy was without warrant of law.

Having thus disposed of the immunity issue at the trial on rulings of law, the Court undertook to dispose of it after the trial on findings of disputed questions of fact by deciding the motion to suppress evidence, which as a practical matter had become *functus* by the denial of the motion to strike.

The Circuit Court of Appeals has affirmed. Thus the Petitioners have been denied their constitutional right to a trial by jury of their defense of immunity, to which they were plainly entitled unless the courts below were right in holding that delinquent taxpayers cannot secure immunity from criminal prosecution under the Treasury Department's disclosure policy.

In this connection it may be noted that although the Circuit Court of Appeals at the outset of its opinion correctly stated the questions raised by Petitioners (R. 2195), when it came to discuss the second question (F. 2199-2200) that Court mistakenly treated the point as involving the Compromise statute, upon which the argument in nowise depended, and which it specifically disavowed.

At the conclusion of the evidence, the Trial Judge said that he would submit the confession issue to the jury as requested by the Petitioners' Request 25 (R. 1690). How-

ever, he later declined to do so, largely on the ground that it might harm the Petitioners to grant their request (R. 1840). He thought that he would be unable to make the jury understand that a disclosure could be voluntary under the Treasury Department policy but involuntary under the confession doctrine if induced by an official promise of immunity made without warrant of law.

The Circuit Court of Appeals has affirmed on the ground that whether there was a denial of due process and a violation of the Petitioners' immunity from self-incrimination involved merely a question of the admissibility of evidence, which was for the Court and not for the jury.

It held that the confession was not induced by the Treasury Department promise because made after the investigation had begun.

It treated the defense of immunity and the question whether the Petitioners were convicted on evidence which came from an improperly induced confession as identical and dependent on whether the evidence was furnished by them "after the government investigation had begun" (R. 2197-99). It ignored the established facts: (1) that the Treasury Department had long and widely publicized its promise of immunity from criminal prosecution to delinquent taxpayers who made voluntary disclosures before investigation; (2) that the letters of April 25, 1945 were submitted to and received by Collector Pedrick under that policy; (3) that Examiner Diehl's investigation was made pursuant to those letters, and (4) that it confirmed the frankness and completeness of the disclosure.

If the confession was induced by an official promise of immunity, it did not matter whether a Treasury Department investigation had already begun any more than it mattered whether the Treasury Department might have obtained the evidence by invoking its statutory powers, if there had been no confession.

Thus the question whether the Petitioners' constitutional rights were invaded by using the evidence, which was the substance of their confession, to convict them was not even decided by the District Court and was decided by the Circuit Court of Appeals on erroneous grounds without even considering the determinative facts.

Respectfully submitted,

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APPENDIX

TAX FRAUDS AND VOLUNTARY DISCLOSURES

[Par. 8697] *Address by Chief Counsel of Bureau.*—John P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, in an address before the Tax Executives Institute annual dinner at the Waldorf-Astoria hotel in New York City on Wednesday, May 14, considered the subject, "Tax Fraud and Voluntary Disclosures." The full text * of the speech follows: * * *

Quite simply, attempted evasion is a disease, and a disease that has to be fought with strong remedies. That is why, once criminal fraud is discovered by our examining officers, the Federal Government is unbending and relentless. The law requires the prosecution of the tax-evader and that is what the Department recommends to the Attorney General.

There is one important exception to that. The Department has broad discretionary power long recognized by the Congress to determine the policy and procedure for the effective enforcement of the internal revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. For years the position of the Department has been that where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

The Department has always encouraged voluntary disclosures.

And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the government.

Healthy administration of the internal revenue laws long ago dictated that policy, and I believe that its worth is obvious.

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* Only the pertinent portions are here reprinted.

The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices —whether it is the Collector, a Deputy Collector, a Revenue Agent, a Special Agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that "I have filed false tax returns and I want to make the government whole," would constitute a complete disclosure. Of course, it is usually best to present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite.

What kind of people make disclosures? They are all kinds. Some are people who are honestly repentant. Others are people who would rather sacrifice their ill-gotten gains than go to jail. Some are small people. Others are large corporations.

We had a good illustration recently in the midwest. A large produce concern, that had enriched itself on war contracts to help feed the army, came to see the light. It made a complete statement to our local officials and paid $1,765,000 in taxes, interest and civil penalties in order to clear its record and to keep its officers out of jail.

We have had voluntary disclosures from black market meat and car dealers. We have had similar repentances from people in all walks of life. Of the $3,000,000,000 collected from taxpayers within the past eighteen months as a result of the current drive against tax evaders, $500,000,000 has been paid on voluntary disclosures.

Now we have said that in order to be considered voluntary, a disclosure must be made before we have initiated an investigation in the case. Therefore, it is essential that we define "the initiation of an investigation."

The mere record of a name does not mean that an investigation has been initiated. The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure merely because we have a name, would be com-

parable to regarding the telephone book as a dossier of tax evaders.

An investigation is initiated when a Special Agent, an Internal Revenue Agent, a Deputy Collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.

The time of disclosure and the time an investigation begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecting both the government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard.

We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he "gets religion" before we have done anything, he will not be prosecuted.

Before we leave this subject, let me make one thing clear. When we excuse a man from criminal prosecution because of his voluntary disclosure, we are not in any sense condoning his action. Nor are we letting anyone off easy. At the outset, I mentioned that there are two kinds of fraud, criminal and civil. Voluntary disclosure excuses a man from criminal punishment, but it does not excuse him from the civil penalties. Therefore, the public revenues and the public conscience are both protected by this policy.

In excusing the man from criminal prosecution, we are merely taking a sensible step to produce the revenue called for by law with the minimum cost of investigation. The man who makes a voluntary disclosure saves us a lot of money in investigating. In return, we can spare him a term in jail. This is good business from his standpoint and it is good business from the government's standpoint.